NO. 81857-6

SUPREME COURT OF THE STATE OF WASHINGTON

COMMUNITY CARE COALITION OF WASHINGTON; HOME CARE OF WASHINGTON, INC.; THE FREDRICKSON HOME; CYNTHIA O'NEILL, a Washington Citizen and Taxpayer; RON RALPH and LOIS RALPH, husband and wife and Washington Citizens and Taxpayers,

Petitioners,

v.

SAM REED, Secretary of State,

Respondent,

and

LINDA LEE and PEOPLE FOR SAFE QUALITY CARE,

Interveners/Respondents.

REPLY BRIEF OF PETITIONERS

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I. INTRODUCTION

Sending Initiative 1029 to the Legislature in accordance with the directions of the petition signers advances and facilitates the initiative power; it does not undercut the process as the Secretary and Interveners assert. In Washington, one of two legislative processes may be initiated by the voters, with very different pathways leading to different arrays of choices. The decision of which initiative process will be followed is not a choice reserved to the sponsor. It is a fundamental element of the decision voters have when presented with an initiative petition. The Secretary and the Interveners, however, view the differences in the initiative processes as "insubstantial." Whether or not the differences are important or insubstantial lies at the heart of the different legal positions the parties have advanced to this Court.

II. ARGUMENT IN REPLY

A. The I-1029 Petitions Substantially Comply with the Form and Language Requirements for an Initiative to the Legislature; the Secretary Has No Discretion and Must Send the Initiative to the Legislature in Accordance With the Signers' Directive.

The fundamental flaw with the Secretary of State's ("Secretary's") and the Interveners' arguments is their failure to read and apply the plain statutory language that governs the limited discretion given by the Legislature to the Secretary. The discretion granted the Secretary in filing initiative petitions is found in RCW 29A.72.170 and is limited to three grounds. However, if none of those three grounds exist, the Secretary has

no discretion and must accept and file the petitions. RCW 29A.72.170 in relevant part states:

> The secretary of state may refuse to file any initiative or referendum petition being submitted upon any of the following grounds:
>
> (1) That the petition does not contain the information required by RCW 29A.72.110, RCW 29A.72.120, or RCW 29A.72.130.
>
> (2) That the petition clearly bears insufficient signatures.
>
> (3) That the time within which the petition may be filed has expired.
>
> . . .
>
> If none of the grounds for refusal exists, the secretary of state must accept and file the petition.

(Emphasis added.) Because this provision gives the Secretary no discretion to decide whether to reject an initiative petition when that petition substantially complies with RCW 29A.72.110 or .120, the Secretary had the fundamental obligation to first determine whether the I-1029 petitions substantially complied with either of these sections. If the Secretary had carried out this responsibility, he would have found that the petitions complied almost exactly with the requirements and language of RCW 29A.72.110 for an initiative to the Legislature.[1] That substantial

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[1] An initiative to the Legislature under RCW 29A.72.110 requires petitions to "be in substantially the following form" and that form includes the key directive language: ". . . legal voters of the State of Washington, respectfully direct that this petition and the proposed measure known as Initiative Measure No. ....., be transmitted to the legislature of the State of Washington at its next ensuing regular session, and we respectfully petition the legislature to enact said proposed measure into law)" . . .

The same relevant portion of the I-1029 petitions states: "legal voters of the State of Washington, respectfully direct that this petition and the proposed measure known as

(Footnote continued)

compliance with RCW 29A.72.110 extinguished his discretion. The Secretary had no basis to decide that the initiative petitions were in substantial compliance with the language and requirements of RCW 29A.72.120 for an initiative to the people when they contained no language to that effect, but only language to the contrary.

Both RCW 29A.72.110 and RCW 29A.72.120 require initiative petition forms to include the same provisions and language with one marked exception, the directive language indicating whether the measure is being sent to the Legislature or to the people. Although the I-1029 petitions did not contain the key directive language for submission to the people, the Secretary decided that the petitions substantially complied with the RCW 29A.72.120 in form and language and certified the measure for the November ballot. The language appearing on the face of the I-1029 petitions resolves this case. The petitions precisely complied with RCW 29A.72.110's form and language for an initiative to the Legislature. The Secretary's discretion to look further to determine whether the I-1029 petitions are in substantial compliance with RCW 29A.72.120 never comes to pass. *See* RCW 29A.72.170.

(. . . continued)
Initiative Measure No. 1029, . . . be transmitted to the legislature of the State of Washington at its next ensuing regular session, and we respectfully petition the legislature to enact said proposed measure into law; . . ."

(Emphasis added.) The I-1029 petitions substantially and almost exactly mirror the language required by RCW 29A.72.110.

Moreover, even if the right to exercise discretion did arise, the Secretary far exceeded his bounds when he decided that the I-1029 petitions were in substantial compliance with RCW 29A.72.120 despite the clear omission of necessary language directing the initiative to the people. Without any language required under RCW 29A.72.120 directing the initiative to go to the people, the initiative petitions cannot be in substantial compliance, as the Secretary claims. This petition language is not insubstantial; it is absolutely critical to RCW 29A.72.110's and .120's meaning and purpose.

The Secretary and Interveners, however, assert the omitted "submitted to the people" language is inconsequential and that the petitions "submitted to the legislature" language may be ignored. *See* Secretary's Br. 17-18; Interveners' Br. 19, 44. Accepting this argument would give the only significant difference in the forms and language in RCW 29A.72.110 and .120 absolutely no effect and make the required directives superfluous and meaningless. *See Morgan v. Johnson,* 137 Wn.2d 887, 892, 976 P.2d 619 (1999) (the Legislature means exactly what it says; statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.) If this language can be ignored, there would be no need to have these two sections at all. And if the statutory requirement that a petition "must be in substantially the following form" can be disregarded by the Secretary, and indifference accorded the plain language on the face of the I-1029 petitions, the legislative direction to disclose to voters signing petitions

where the initiative is being directed will be nullified. This is contrary to rules requiring effect to be given to all provisions of the law. *See Dep't of Ecology v. Campbell & Gwinn, L.L.C.,* 146 Wn.2d 1, 9, 43 P.3d 4 (2002). If effect is given to the plain meaning of the language in RCW 29A.72.110 and .120, then the required notice cannot simply be read out of the statute as an "insubstantial" term. The intent of the sponsor is only carried forward with the signatures of the voters. The Legislature did not intend for voters to sign initiative petitions blindly or under a misrepresentation of where the measure is to be directed. The sponsor's intentions and wishes do not, and cannot, override this plain statutory language.

B. Though Markedly Different in Their Reasoning, Both the Secretary and the Interveners Would Read the Requirement That An Initiative Petition Be Substantially in the Required Form Entirely Out of the Statute.

The Secretary and the Interveners take very different positions on fundamental aspects of the initiative process. The Secretary takes the unsettling position that a checked box on a form in the Secretary's internal files conclusively determines whether a proposed measure is an initiative to the Legislature or an initiative to the people and that the language on the petition actually signed by the voter is of no import. In contrast, Interveners allege that the sponsor of the initiative is solely responsible for determining which of the two initiative paths the measure is to take. Thus, according to Interveners, any mistake or lack of directive language is of no consequence since the sponsor's intent controls.

1. The Secretary argues that the filing date of the initiative measure and the Secretary's internal process takes precedence over the statutory language.

The Secretary claims he has complete discretion to decide whether to accept and file the I-1029 petitions as an initiative to the people regardless of the language directing the initiative to the Legislature. Secretary's Br. 21. The Secretary fails to understand that his discretion has limits and that he has mandatory obligations that cannot be ignored. Nowhere in the Secretary's brief does he recognize that he has an equal and impartial administrative obligation to assess the petitions to determine whether they do or do not contain the information required by RCW 29A.72.110. The Secretary does not have the unfettered discretion to simply choose to accept one form of initiative petition over the other when the petitions substantially comply with only one of the statutory forms.

The Secretary's failure to recognize the bounds of his discretion is evidenced by his claim that I-1029 substantially meets the requirements of RCW 29A.72.120 since there are only a limited number of requirements that the sponsor and proponents need to meet in order to place the measure on the ballot, and "Initiative 1029 complies with all of them." Secretary's Br. 27. The Secretary supports this assertion by listing the various steps and requirements of the initiative process. *See* Secretary's Br. 27-29. This list of factors, however, has nothing to do with the form and language requirements explicitly set out in RCW 29A.72.110 and .120. The Secretary's list provides no support for the Secretary's claimed discretion

or his conclusion that the petitions substantially complied with RCW 29A.72.120.[2]

Since the Secretary cannot create language where none exists, the Secretary resorts to several other thin arguments which, if adopted, would dilute mandatory initiative petition requirements. These arguments include:

- The omission of language directing the initiative to the voters is inconsequential and "is, at best, a secondary and insubstantial purpose of initiative petitions, and likely accounts for the fact that no constitutional provision or statute unequivocally requires such information on petitions." Secretary's Br. 32-33. This assertion not only ignores the clear provisions of both the Constitution and chapter 29A.72 RCW, but sends the troubling message that this state's chief election officer views voters' right to know where the initiative is to be directed as inconsequential. This is also troubling because the chief elections officer seems to suggest that his internal procedures carry greater weight and effect than the laws enacted by our state Legislature.

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[2] The Secretary fails to mention that each of the requirements he lists applies equally to both initiatives to the people and to the Legislature because both types of petitions must contain: the ballot title ballot and measure summary; valid signatures of registered voters numbering at least eight percent of the votes cast for the Office of Governor at the most recent election; the warning against illegal signing required by RCW 29A.72.140; lines for not more than 20 signatures and addresses; the petition circulator's statement regarding the collection of signatures; and the petitions must be printed on paper measuring at least 11 inches by 14 inches. *See* Secretary's Br. 27-29. Nevertheless, Interveners argue that the language "ballot title" indicates an initiative to the people. Interveners' Br. 37. If this were the case, the Secretary could convert every initiative to the Legislature into an initiative to the people.

- "The precise process by which that enactment will take place or be considered is not what is critical; rather, it is that the signer supports the substance of the proposed law and its consideration" and Petitioners therefore "attach far too much significance to form." Secretary's Br. 33. Of course, the demonstrated support for the proposal's substance is present in either type of initiative. For some, a signature may only indicate a judgment that the matter deserves further consideration, and in this case by the Legislature. It is not attaching too much significance to form to require the Secretary to follow the plain directive on the I-1029 petitions and send the measure to the Legislature, especially when RCW 29A.72.110 and .170 require him to do just that.

- The box checked by the sponsor at the time of filing determines the character of the initiative, and overrides the statutory mandates of RCW 29A.72.110, .120, and .170. *See* Secretary's Br. 17-18, 27, 34-35. However, RCW 29A.72.010 only requires the sponsor to submit an affidavit swearing the sponsor "is a legal voter" and nothing more. A checked box on an affidavit form created by the Secretary, and not readily accessible to petition signers, does not override statutory requirements.

- The serial number, I-1029, advises voters that the initiative was directed to the people. *See* Secretary's Br. 35. While RCW 29A.72.040 requires each initiative to be serially numbered, that numbering is for ministerial tracking purposes and not as a supplement to the required notice language of RCW 29A.72.110 and .120.

- It is not necessary for voters signing petitions to be provided the directive language on the petitions because the "People will have their say at the time of the vote." Secretary's Br. 33. Voters who sign initiative petitions, not the proponents, are directing the initiative to the people or the Legislature. Thus, the initiative must be construed by looking at what the voters who signed the petitions considered, not affidavits of sponsors' intent contained in government files. *See Alaskans for a Common Language Inc. v. Kritz*, 170 P.3d 183 (2007) (In construing an initiative, the court "will rely only upon materials . . . voters had available and would have relied upon to determine the scope and impact" of the initiative, and those materials do not include affidavits of sponsors.)

- A banner across the top of the petitions saying "Yes, I-1029" and the statement "should this measure be enacted into law" advised voters that the initiative was directed to the people. Secretary's Br. 33-34. Both the banner and the statement asking whether the measure should be enacted into law can just as readily be construed as saying "yes" to sending the initiative to the Legislature for enactment.

- Because the I-1029 petitions were filed within the period prescribed by law for an initiative to the people, the voters understood I-1029 was an initiative to the people. Secretary's Br. 35. However, I-1029 was filed on March 12, 2008, which was the first possible day for filing petitions to the Legislature. Thus, the fact that the signed petitions were submitted to the Secretary on the last day for filing a measure to the people is no more persuasive than the counter-argument that the petitions

were filed on the first day of the period prescribed for an initiative to the Legislature. Indeed, since the time periods for filing and submitting both types of initiatives overlap, I-1029 readily met the time periods for filing and submitting both types of initiative petitions.

- The reference to the August 2009 and 2010 dates included in the text of the measure for rulemaking and other actions would have apprised voters that I-1029 is an initiative to the people. Secretary's Br. 36-37. The Legislature's 2009 regular session commences January 12, finishes on April 27, and the law becomes effective 90 days later (without an emergency clause). This schedule provides sufficient time to meet the August 2009 rulemaking deadline, even without emergency rules.

These arguments also make assumptions about voters, after petitions have been signed, that this Court has recognized as dangerous to the process. In *Coppernoll v. Reed*, 155 Wn.2d 290, 119 P.3d 318 (2005), this Court declined an invitation to sever, and thereby edit, three offending sections of a challenged initiative because "[d]oing so would raise obvious questions whether the newly-edited initiative remains true to the intent of those who signed the proposed initiative to qualify it for certification to the legislature." *Id.* at 305. Thus, guessing as to whether the "edit" made by the Secretary remains true to the intent of signing voters is not allowed.

The Secretary finally concedes late in his brief that the I-1029 petitions do not contain RCW 29A.72.120's required language, but claims that the deficiency is a mere technicality no greater than what the Court excused in *Schrempp v. Munro,* 116 Wn.2d 929, 809 P.2d 1381 (1991).

See Secretary's Br. 21, 31; *see also* Interveners' Br. 33-34. The Secretary then exhorts this Court not to "entertain rigorous quests to find deficiencies in petitions, but to reasonably and faithfully give effect to the right of initiative." Secretary's Br. 31. It does not take a rigorous quest to find the deficiency in the I-1029 petitions if those petitions are treated as initiative petitions to the people. The deficiency is the lack of the statement: "[w]e, the undersigned citizens and legal voters . . . respectfully direct that the proposed measure . . . be submitted to the legal voters of the State of Washington for their approval or rejection at the general election . . ." RCW 29A.72.120. This "deficiency" is not a mere technicality but a complete omission of the most critical portion of RCW 29A.72.120.

Nor does the Court's holding in *Schrempp* support the Secretary's characterization of these petitions or this case. The Secretary overlooks determinative differences between the facts and circumstances here and those in *Schrempp*: the Court in *Schrempp,* recognized and emphasized that the discretionary authority of the Secretary under RCW 29A.72.170 is limited and that if the three grounds for refusal do not exist, the Secretary must accept and file the petition (*Id.* at 934); *Schrempp's* petition contained only one inconsistent phrase ("to the people") and all other references stated prominently that the initiative was being submitted to the Legislature (*Id.* at 938); the Secretary properly exercised his discretion under the first ground of RCW 29A.72.170 because the *Schrempp* petitions substantially complied with RCW 29A.72.110 *(Id.* at 937-938);

appellants in *Schremp* argued that the petitions at issue should completely be rejected unlike Petitioners here (*Id.* at 936); and appellants in *Schrempp* did not argue the Secretary's acceptance of the petition was arbitrary and capricious or contrary to law (*Id.* at 937). In contrast, the Secretary's exercise of discretion in this case far exceeds the bounds of RCW 29A.72.170, and in any event his remarkably unsupported decision that I-1029's petitions substantially comply with RCW 29A.72.120's requirements for an initiative to the people is arbitrary and capricious and contrary to law.

2. Interveners argue that the sponsor retains complete control over the initiative's form and process, and the sponsor's intent takes precedence over the statute.

In contrast to the Secretary's arguments, the Interveners assert there is nothing in the Washington Constitution that requires an initiative sponsor to state at the outset whether the petition will be directed to the people or to the Legislature and that whether the initiative is directed to the people or the Legislature is wholly within their discretion. Interveners' Br. 24. Thus, according to Interveners, the language on their petitions, signed by the voters, is irrelevant and those printed statements saying the initiative is of one type can be changed by proponents to the other type upon filing. They defend their omission of the language by stating the petitions are being directed to the people by pointing to clues they claim were present in the process. Most of these "clues" are duplicative of the factors argued by the Secretary and include:

- the reference to "initiative of 2008," which Interveners allege would lead a voter to query "[i]f I-1029 had been an initiative to the Legislature, it would have been a "2009 initiative" since the Legislature will not meet again until 2009. Interveners' Br. 35.
- the significance of the initiative numbering system and the fact that fewer initiatives to the Legislature have been filed. *Id.*
- the 2009 dates for the implementation of certain rulemaking and other requirements included in text of the measure. *Id.*
- instructions to Intervener's petition gatherers and the mailers regarding the date of mailing on the back page of the petition. *Id.* This last assertion is the only one not raised by the Secretary, and thus has not been previously addressed. The mailing instruction was included in a box on the back of the form addressed to the gatherers. The voters would not have seen this mailing deadline to be applicable to them or the character of the initiative. Interveners' Br. 35.

Underlying each of these factors is Interveners' assumption that voters signing the petitions understood from these "clues" that the language on the face of the petitions was in error and that their signature would actually direct the initiative to the people. Interveners, however, have no response as to how these factors can substitute for statutorily-required language stating where the initiative is being directed. Nor do they explain why their compliance with this requirement should be excused when the burden imposed by the requirement does not outweigh compliance or ensure the sanctity of the process.

The Interveners also claim that the Secretary, as the state's "chief elections officer," has "determined the most prudent course for the public interest in this case" and "properly recognized the best way to measure the true level of popular support for I-1029 is by letting the people vote on it." Interveners' Br. 39. Again, this perception of the initiative process, as well as the limits of the Secretary's discretion, do not comply with RCW 29A.72.170. It is not the Secretary's role to decide what in his opinion is "the most prudent course" or to favor submitting an initiative measure to the voters over submission to the Legislature. *See* RCW 29A.72.170.

While all parties recognize the first power reserved by the people is the initiative, and that the power can take the form of an initiative to the people or to the Legislature, the Secretary and Interveners treat an initiative to the people as having greater status and benefit of presumption. *See* Secretary's Br. 33; Interveners' Br. 39, 41 ("the Constitution and RCW 29A.72 'place a thumb on the scale' of holding an election for the proposed initiative measure."). The Constitution makes no such policy or public interest distinction but rather treats both initiative options equally. Likewise, chapter 29A.72 RCW includes no language of preference or public policy superiority for one form of the initiative power over the other. Both processes provide voters the occasion to debate the measure and to consider alternatives. Voters simply will not be disenfranchised by a measure's submission to the Legislature, as claimed by Interveners and the Secretary.

C. Disregarding the Language on the Initiative Petition Would Harm the Initiative Process By Making Voters Unable to Determine the Effect of Their Signatures.

The Secretary and the Interveners urge this Court to ignore the language of the signed petitions and allow them to discern signers' intent using evidence extraneous to the petition. The Court should decline this invitation to untether the signatures of the voters from the process being initiated. Not only is it in error in this case, but it establishes a dangerous precedent that will affect future initiative petitions. Persons presented with initiative petitions would have no reliable source of information about what type of initiative they were being asked to sign. If the voter cannot rely on the language on the face of the petition, in what information can he or she have confidence? Is it what the signature gatherer says? Does it require a weekday trip to the Secretary of State's office to see which box is checked? Does it require internet access to determine where the initiative appears on the Secretary's website? Would the effect of the voter's signature remain uncertain until the signature gathering process is complete to see what filing timeline the proponents adhered to?

None of these suggestions substitute for the requirement that a petition state on its face the type of initiative to which the signer is subscribing. This is what the Legislature required in laws enacted just two years after the Legislature proposed and the people approved these distinct forms of initiative. Laws of 1913, ch. 138, §§ 5 and 6. The Secretary and the Interveners would shift the burden to the courts to sort out what the voters may have understood. If the courts undertake to determine whether

voters have been misled by various sources such as newspapers or signature gatherers "they would find themselves busy indeed." *Edwards v. Hutchinson,* 178 Wash. 580, 584-85, 35 P.2d 90 (1934). The Legislature properly determined that this fundamental element of an initiative must appear in the operative language of the petition in conjunction with the signatures. This facilitates the initiative process by providing an established and consistent source of information in which voters may have confidence as they determine whether or not to sign a petition.

III. RESPONSE TO MOTIONS TO DISMISS

A. The Question of Which Initiative Process Has Been Invoked Is Properly Decided at the Critical Juncture Where the Measure Is Certified Either To the Legislature or the Ballot.

The Interveners, but not the Secretary of State, argue that this matter is not properly considered prior to an election.[3] The Interveners' argument is premised on their view that the Legislature did not "require" the petition form set forth in RCW 29A.72.120 and therefore the case does not involve procedural "requirements." Interveners' Br. 18-19. Clearly this challenge falls into the second of three recognized categories: (1) the measure, if passed, would be substantively invalid; (2) the procedural requirements for placement on the ballot or transmittal to the Legislature

[3] *See* Secretary of State's Response to Motion for Expedited Review of Petition Against State Officer 11 n. 4 , noting: "The Secretary of State does not contend that the Court's long line of cases declining to consider challenges to the substantive validity of ballot measures applies to this case." (Citing *Coppernoll v. Reed*, 155 Wn.2d 290, 298, 119 P.3d 318 (2005), which noted procedural challenges are proper because the inquiry is "whether the proper procedures have been followed in order to invoke the initiative process in the first instance.")

have not been met; and (3) the subject matter is not proper for direct legislation. The latter two types of challenges are properly considered prior to any election. *Futurewise v. Reed*, 161 Wn.2d 407, 411, 166 P.3d 708 (2007).

Now is the time for resolution of which of two distinct initiative processes have been invoked—the power to require the Legislature to consider the initiative and take a range of possible actions or the power to have an "up or down vote" on a measure. After the signatures on the petition are verified and canvassed, the Secretary must either send a certificate of facts relating to the filing to the Legislature, RCW 29A.72.230, or certify the measure for the ballot, RCW 29A.72.250. Review is appropriate at this critical juncture in the initiative process.

B. The Legislature Cannot and Did Not Preclude the Availability of Constitutional Writs.

The Secretary argues statutory provisions limiting review and standing should be "heed[ed]" by this Court. Secretary's Br. 20. Interveners argue that "in the specific context of the Secretary's decision to *accept* and file an initiative petition, the courts have no power to issue a writ of mandamus." Interveners' Br. 23 (emphasis in original). This is not the law. There is a clear distinction between the Legislature's authority to limit a party's *right* of appeal and the Court's discretionary inherent authority to exercise its original jurisdiction in mandamus or certiorari. The Court is vested with a sound legal discretion to determine for itself whether a question presented calls for the exercise of its original

jurisdiction. *State ex rel. O'Connell v. Meyers*, 51 Wn.2d 454, 459-60, 319 P.2d 828 (1958). Similarly, a long line of cases recognizes that statutory limits on judicial review cannot limit the Court's inherent power of review, as set forth in *Saldin Securities, Inc. v. Snohomish County,* 134 Wn.2d 288, 295-296, 949 P.2d 370 (1998):

> This court has repeatedly held that "the court's 'constitutional power of review cannot be abridged by legislative enactment.'" *Kreidler,* 111 Wn.2d at 835, 766 P.2d 438 (quoting *State ex rel. Cosmopolis Consol. Sch. Dist. 99 v. Bruno, 59 Wn.2d 366, 369, 367 P.2d 995 (1962)*); *see also State ex rel. Hood v. Personnel Board,* 82 Wn.2d 396, 399, 511 P.2d 52 (1973) (the Legislature may decide whether a state agency may appeal from an adverse decision; however, this is "always subject to the inherent constitutional power of the judiciary to review illegal or manifestly arbitrary and capricious actions"); *North Bend Stage Line v. Department of Pub. Works,* 170 Wash. 217, 228, 16 P.2d 206 (1932) (appellate jurisdiction of the court is defined by the constitution and cannot be diminished by the Legislature); *Bridle Trails,* 45 Wn. App. at 251 n. 4, 724 P.2d 1110 ("[r]eview under the court's inherent powers may not be impinged by the Legislature"); *Dorsten,* 32 Wn. App. at 789, 650 P.2d 220 (a statutory limitation of judicial review does not abridge a court's constitutionally inherent power of review).

Here, the Legislature only addressed the matter within its purview, *i.e.,* when there would be a review as a matter of right.

Also, the Secretary argues this Court lacks jurisdiction because hee has reached a legal conclusion that he has complete discretion to "set aside" the matter of the petition form and therefore a writ should not issue. Secretary's Br. 27, 32. This argument emphasizes the reasons this case

calls for the exercise of the Court's jurisdiction. The Court applies the "checks and balances" that are fundamental features of the separation of powers. "[T]he legislature makes, the executive executes, and the judiciary construes the law." *Wayman v. Southard*, 23 U.S. (10 Wheat) 1, 46, 6 L.Ed. 253 (1825). If an executive officer acts beyond the bounds of the discretion that the Legislature delegated to him, he may be controlled by mandamus to keep within those limits. *See* Petitioners' Br. 17 – 18. The Secretary has offered his interpretation of the bounds of his discretion as a reason for the Court to decline jurisdiction, but "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803).[4] These important issues call for exercise of the Court's original jurisdiction to say what the law is. *See State ex rel. O'Connell,* 51 Wn.2d at 459.

C. Petitioners Have Standing As Voters, As Persons Beneficially Interested in Legislation Regarding Long-Term Care Services, and As Taxpayers.

The Secretary and Interveners have requested this matter be dismissed for lack of standing. Interveners' Br. 26-30; Secretary's Br. 18-20. Petitioners have standing on several independent bases. First is the status of Petitioners Cynthia O'Neill, Ron Ralph, and Lois Ralph as

[4] Another consideration is whether it is necessary to refer questions of fact to a special master or to the superior court. *See* RAP 16.2(d). Here an Agreed Statement of Facts was filed on July 31, 2008, that provides the factual basis for the Court to determine the issues raised by the petition. The documents attached to the Petitioners' request for judicial notice, which request was denied, simply provided background information and do not contain facts necessary for resolution of any issue in this matter.

citizens and voters. In *State ex rel. Harvey v. Mason*, 45 Wash. 234, 237, 88 P. 126 (1907) the Court asked: "What higher interest can any one have in an election and its result than the citizen and voter? The question is one of general public interest, and in such cases any citizen is beneficially interested, and may institute mandamus proceedings." This case was cited in a recent decision recognizing voters' standing to challenge the validity of signatures supporting a recall election. In *In re Recall of West,* 156 Wn.2d 244, 246, 126 P.3d 798 (2006), the Court rejected the contention that petitioners did not have standing: "This court has held that voters have sufficient interest to bring an action for mandamus in a case involving an election." *Id.* at 249.

Additionally, "[a]n individual has standing to bring an action for mandamus, and is therefore considered to be beneficially interested, if he has an interest in the action beyond that shared in common with other citizens." *Retired Pub. Employees Council v. Charles*, 148 Wn.2d 602, 616, 62 P.3d 470 (2003) (citation omitted). "For purposes of standing under the mandamus statute, all that must be shown is that the party has an interest in the matter beyond that of other citizens. The simplicity in this standard compels the conclusion that Retirees and Employees have an interest, beyond that of other citizens, in changes made to the retirement system." *Id.* at 620. *See also Grant County Fire Protection Dist. No. 5 v. City of Moses Lake,* 150 Wn.2d 791, 802, 83 P.3d 419 (2004) (property owners are within the "zone of interest" of the law relating to the petition method of annexation as an alternative form to the election method of

annexation and had standing to challenge the constitutionality of the petition method). Further, when a controversy is of substantial public importance, this Court has been willing to take a "less rigid and more liberal" approach to standing. *Id.* at 803 (citations omitted).

Petitioners have an interest beyond the general public. Petitioners are parents, caregivers and care providers whose daily lives, programs or staffing will be impacted by I-1029's effects.[5] They have stated their interest in presenting alternative approaches to the Legislature that will promote the provision of appropriate care to the elderly and persons with disabilities while containing the costs of such care and allowing close relatives to provide care without the full certification I-1029 would require. Petition Against State Officer Sam Reed ("Petition"), ¶¶ 17-21.

Interveners and the Secretary argue the only remedy for Petitioners is a political one. Interveners' Br. 17; Secretary's Br. 18. They rely on a phrase from *Schrempp v. Munro,* 116 Wn.2d 929, 809 P.2d 1381 (1991) read in isolation. There, the Court recognized that the Legislature could provide a right of appeal to proponents of an initiative without being

[5] Initiative 1029 would require that long-term care workers complete 75 hours of training and pass a certification examination that includes both a skills demonstration and a knowledge test, with 12 hours of continuing education each year. I-1029, §§ 4, 5, 6, 9. While individuals caring only for their own parent or child need not be certified, they would be subject to training requirements of 35 hours of training. *Id.*, §§ 7 and 8. Part-time workers working less than 20 hours in a month would be required to receive 35 hours of training, and would be subject to the continuing education requirement in 2014. *Id.*, §§ 8 and 9. The measure would prohibit the State from paying for long-term care services by providers who do not comply with the requirements of this measure. *Id.*, § 13. It would permit the State to terminate any contracts with providers, or take enforcement actions against providers, who fail to comply with the measure. *Id.*

required under the equal protection clause to give the same right of appeal to opponents of a measure. *Id.* at 935-936. The Court immediately went on to recognize that the opponents "do have constitutional rights which they can express to the Legislature in its consideration of the initiative, and, if it goes to a vote of the people, they can express their opposition and vote thereon." *Id.* Depriving the Petitioners of their opportunity to ask the Legislature to consider various alternatives to the initiative and place an alternative before the voters affects recognized rights of the Petitioners. *See also In re Proposed Initiative Measure No. 20*, 774 So.2d 397 (Miss. 2000) (each elector is a part of the "legislative machinery" with regard to proposal and enactment of initiatives sufficient to confer standing on opponents challenging sufficiency of initiative).

Petitioners Cynthia O'Neill and Ron and Lois Ralph also brought this action as taxpayers with interests in the fiscal impacts of a general election vote and canvass and the fiscal impact if I-1029 is implemented as law. Petition, ¶¶ 20-21. *See also* Fiscal Impact Statement for Initiative 1029 at http://wnn.ofm.wa.gov/initiatives/1029.asp. The Interveners argue that there is no taxpayer standing because "[a]ny financial 'injury' these individuals might experience as a result of the Secretary's decision to place I-1029 on the ballot is not different than the 'injury' to every other taxpayer." Interveners' Br. 29. This argument is based on a misconception of the law. "It is well settled that taxpayers, in order to obtain standing to challenge the act of a public official, need allege no direct, special or pecuniary interest in the outcome of their action, there

being only a condition precedent to such standing that the Attorney General first decline a request to institute the action." *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 269, 534 P.2d 114, 115 (1975) (citations omitted). "The recognition of taxpayer standing has been given freely in the interest of providing a judicial forum when this state's citizens contest the legality of official acts of their government." *State ex rel. Boyles v. Whatcom County Superior Court,* 103 Wn.2d 610, 614, 694 P.2d 27 (1985).[6]

IV. CONCLUSION

This Court should require the Secretary of State Reed to accept the I-1029 petition as an initiative to the Legislature.

Respectfully submitted this 28th[th] day of August, 2008.

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[6] While the lead opinion in *Greater Harbor 2000 v. City of Seattle,* 132 Wn.2d 267, 281, 937 P.2d 1082 (1997) suggested that taxpayer standing requires a showing of violation of a unique right, only two justices signed and no other justices concurred on that issue. Rather, four justices expressly disagreed. *Id.* at 286 (Madsen J., concurring/dissenting, and disagreeing the taxpayer must suffer some particularized injury) and *id.* at 298 (Sanders, J., dissenting and noting long line of cases providing a taxpayer need not allege a personal stake).